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No. 666

In the Supreme Court of the United States

OCTOBER TERM, 1961

LEROY ALPHONSO HAITH, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINIONS BELOW

The opinion of the court of appeals (Pet. 2–8) is not yet reported. The memorandum opinion of the district court (IR. 6–15)[1] is not reported.

JURISDICTION

The judgment of the court of appeals was entered on December 16, 1961 (Pet. 2). The petition for a

[1] The record on file with the Court consists of two volumes numbered I and II (cited herein as "IR." and "IIR.") plus the collected proceedings in the court of appeals entitled "Transcript of Record" (cited herein as "Tr.").

writ of certiorari was filed on January 15, 1962.[2] The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the district court properly ruled that Treasury agents were not required to obtain a warrant for the search of petitioner's automobile.

2. Whether the record shows the consent of the government to petitioner's waiver of a jury trial.

3. Whether the record was sufficient to show that the grand jury returned the indictment in open court.

STATEMENT

After a waiver of trial by jury, petitioner was found guilty by the United States District Court for the Eastern District of Virginia under a two-count indictment charging the possession and concealment of liquor on which the required tax had not been paid, in violation of 26 U.S.C. 5205(a)(2), 5604(a)(1), and 5601(a)(12) (IR. 2). He was sentenced to a general term of imprisonment for two years (IR. 16).

Initially, the evidence on the merits and in support of a motion by petitioner to suppress the evidence, was presented before a jury (IIR. 5–34). After two witnesses had been heard, petitioner moved to discharge the jury and to submit all questions of law and fact to the court (IIR. 34–35). The government

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[2] On this date the Court denied a petition filed November 30, 1961, in which petitioner sought review of his conviction in the United States District Court for the Eastern District of Pennsylvania under an indictment charging a conspiracy to violate the internal revenue laws relating to the manufacture, distribution and sale of distilled spirits. *Heith* v. *United States*, 295 F. 2d 498 (C.A. 3), No. 577, this Term, certiorari denied, January 15, 1962.

consented and joined in the motion (HR. 34) which was granted by the court and the jury was then dismissed (HR. 35).

Thereupon counsel for petitioner and the government agreed to a stipulation of facts which was dictated into the record (HR. 18). The opinion of the district court contains the following statement of the stipulated facts (HR. 6–8):

> Whereupon, counsel for the defendant and the Government stipulated that the defendant was arrested by a lawful warrant; that the 1960 Pontiac automobile was in the possession and under the control of the defendant; that the defendant, a known "bootlegger" was then being followed by Federal agents and United States Marshals for the purpose of serving the aforesaid lawful arrest warrant; that he was seen parking the 1960 Pontiac twenty-five feet from the front door of his home; that the defendant got out of the said automobile, went into his home, where he was immediately arrested; that the said automobile was observed to be overloaded; that it was equipped with supplemental air-cushioned springs and that a strong odor of corn liquor emanated from the trunk thereof and was detected as such by one of the Federal agents; that the defendant was asked for the keys to the automobile; that he came out to the car and gave the Federal agents keys which fit the ignition, but did not fit the trunk of the car; that the defendant was asked for the keys to the trunk and he stated that he did not have them.
>
> Whereupon one of the Federal agents took out the back seat of the automobile and punched a hole in the cardboard, reached in the

trunk section and took out a half-gallon jar containing corn liquor. The defendant then gave the Federal agent the key to the trunk. The trunk of the said automobile was then opened by the agent in the presence of the defendant. Approximately 90 gallons of corn liquor was found therein.

It was further stipulated by the defendant that the liquid found was alcoholic and did not have the necessary Government revenue stamps thereon and that the Government agents had probable cause for the search of the automobile at the time of the said search.[3]

In his submission of the case to the court, petitioner rested his defense entirely upon the motion to suppress. He conceded that the evidence obtained as a result of the search and seizure was sufficient to convict (IR.

[3] The "stipulation of facts" set forth in the petition (Pet. 9–11) erroneously includes three additional paragraphs from the court's opinion. A reading of the opinion demonstrates that these paragraphs summarize petitioner's contentions and not the facts agreed to by counsel for both sides (see *infra*, pp. 5–6). This reading is corroborated by petitioner's actions in the court of appeals. Thus, the Statement of Facts in his brief (Appellant's Br. 3–4, attached as an Appendix, *infra*, pp. 11–12) did not even include those which he now claims were a crucial part of the stipulation. Further, although the government's brief in the court of appeals (Appellee's Br. 2) described "The second, third and fourth paragraphs of the trial Court's Memorandum Opinion * * * [as] a full and complete statement of facts as stipulated by counsel * * *," and then quoted those paragraphs, petitioner filed no objection or counter-version.

The actual stipulation, as dictated by counsel in open court, was apparently never transcribed by the court reporter who is now deceased. It does not appear in the partial transcript or in any other part of the record filed with the Court in connection with this petition and is not contained in the government's files.

8, 15; IIR. 40). In support of his motion to suppress, petitioner argued that while the agents had probable cause to search the trunk of his automobile where the whiskey was stored, the search and seizure were illegal because they failed to obtain a search warrant when there was no compelling reason why they could not do so (IR. 8; IIR. 37–39; Pet. 2). The district court noted that petitioner contended that he was under lawful arrest and that the automobile was parked and could not have been moved (IR. 8–9).

The district court in a lengthy opinion (IR. 6–15) analyzing the authorities denied the motion to suppress, and on the basis of the stipulation and the evidence found the petitioner guilty as charged. In the court of appeals petitioner reversed his ground, conceding that a warrant was not required if there was probable cause for the search, but contending that there was no probable cause (Pet. 2). In affirming the judgment, the court of appeals considered and rejected the merits of both this contention and the contrary position maintained by petitioner in the district court—*i.e.*, that a warrant was required even though probable cause existed (Pet. 2–8).

ARGUMENT

1. Petitioner's primary contention is that the district court erred in denying the motion to suppress because, although the agents had probable cause for the search, "the facts and surrounding circumstances herein disclosed by this record" (Pet. 13) required them to procure a warrant. To support this claim petitioner relies not upon the facts of record but upon

contentions advanced in argument before the district court and in turn summarized in its opinion (IR. 8–9, emphasis added):

> In support of his motion to suppress the evidence, *the defendant contends* that even though the search was made immediately following a lawful arrest, and that the agent had reasonable and probable cause to search the automobile, the search and seizure in this case is illegal because the agent failed to obtain a search warrant, when he had plenty of time to so do.
>
> The defendant was under arrest; his home was surrounded by Federal agents; and his automobile was parked and could not have been moved. He had no chance of escape and the corn liquor could not have been removed or destroyed.
>
> As *authority for this contention* the defendant relies upon *McDonald, et al* v. *United States*, 335 U.S. 451.

However, petitioner now argues for the first time—the claim was not made in the brief to the court of appeals—that those contentions were a part of the "agreed stipulation" (Pet. 14). A simple reading of the district court's opinion proves the contrary and disposes of petitioner's effort to equate the circumstances of this case with those presented by search of "a store, dwelling house or other structure in respect of which a proper official warrant may be obtained * * *" (*Carroll* v. *United States*, 267 U.S. 132).

Thus, as held by both courts below, the case is within the well-established rule that a warrant is not required for the search of a movable vehicle if the officers have reasonable cause to believe it contains

contraband (Pet. 5–6; IR. 7). *Carroll* v. *United States, supra*; *Husty* v. *United States*, 282 U.S. 694; *Brinegar* v. *United States*, 338 U.S. 160. Petitioner stipulated "that the Government agents had probable cause for the search of the automobile at the time of the said search" (Pet. 10; Statement, *supra*, p. 4). Petitioner's car was a movable vehicle. It was moving when the Treasury agents first sighted it. It continued moving to the point of search on a public street while the agents followed it. Were it possible for circumstances to destroy its character as a movable vehicle, those circumstances are not present here. Thus it is not true (and the record does not show that the government stipulated) that petitioner's car *could not* have been moved or its contents removed or destroyed. The fact that petitioner alighted from and locked the automobile just before his arrest is of little significance. As the court below noted, the car could have been moved or its contents destroyed, with or without keys, by others unless the agents were prepared to protect their possession of it (Pet. 5).

A case very similar to the present one is that of *Scher* v. *United States*, 305 U.S. 251. There officers followed a heavily loaded automobile to the residence of the defendant and then on into a curtilage—an open garage—where the trunk was searched and contraband liquor seized. This Court rejected the contention that passage of the car into the garage destroyed the right to search it, noting (and citing *Carroll* and *Husty, supra*) that "it seems plain enough that just before he [Scher] entered the garage the following officers properly could have stopped peti-

tioner's car, made search and put him under arrest" (305 U.S. at 254–255). So in the instant case, the agents, on the basis of the information they had received as well as their personal observations, could have stopped petitioner's car and searched it at any time after it was sighted. The fact that petitioner had momentarily alighted, locked the car and entered his residence did not destroy this right.

2. Petitioner's alternative contention, advanced initially in the court of appeals, that the agents did not have probable cause to search his automobile is without merit. It is in direct conflict with petitioner's stipulation in the district court that the "agents had probable cause for the search" (Pet. 10; Statement, *supra*, p. 4). Further, it is contrary to the facts of record. The agents were looking for a known "bootlegger." They had information that he would be driving a Pontiac with which they were familiar and concerning which they had information. They observed that the Pontiac was overloaded and that the car had been reinforced with supplemental air cushioned springs. In addition, one of the agents who was very familiar with the odor of moonshine whiskey (IIR, 27) detected a strong odor of this alcohol emanating from the trunk of the car (See stipulation, p. 3, *supra*). As the court below noted (Pet. 2–5), the basis for the agents' belief that the trunk of the car contained contraband whiskey was more than adequate. *Brinegar* v. *United States*, 338 U.S. 160.

3. Petitioner also contends that "reversible error exists, as the record does not show the consent of the attorney for the Government to a waiver of a jury"

(Pet. 21). The transcript of the trial proceedings shows that the court, after a bench conference with counsel, stated:[4]

> Ladies and Gentlemen of the Jury, counsel for the defendant and *counsel for the Government* have agreed, subject to the approval of the Court—they have just approached the bench and stated that in view of certain developments, they are asking the Court to discharge the jury, because the only thing remaining is certain questions of law and this matter will be heard by the Court without the necessity of the jury [emphasis added].

This was effective consent on the part of the government (Rule 23(a), F.R. Crim. P.), and both parties and the court so treated it without objection.

4. The argument that the record does not show that the grand jury returned the indictment in open court is similarly frivolous.[5] The transcript of the district court proceedings, filed March 7, 1961, in the court of appeals (II R. 42–43), states, "The Grand Jury returned to the courtroom at 1:20 p.m. * * * Thereupon the members of the Grand Jury were polled by the

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[4] Tr. 16–17; II R. 34–35, 44–46. An excerpt from the transcript reporting the waiver of the jury (Tr. 16–17; II R. 44–46) was filed in the court of appeals on February 28, 1961, a month and one-half before the case was argued (Tr. 22). Thus, the assertion, contrary to fact, is not explained by petitioner's unsupported contention (Pet. 11) that portions of the transcript filed following the argument cannot be considered part of the record.

[5] The petition in No. 577 unsuccessfully made the same attack on the grand jury indictment under which petitioner was convicted in the United States District Court for the Eastern District of Pennsylvania. *Haith* v. *United States*, No. 577, this Term, certiorari denied, January 15, 1962.

clerk and all were present." This leaves no room for doubt that all members of the grand jury were present in the courtroom in Newport News to return the indictment before Judge Hoffman. Moreover, the first page of the original indictment bears the certification of the district court clerk "Filed in Open Court, 7-12-60" (IR. 2). The fact that the transcript shows that the clerk orally described the bill reciting liquor violations (see Indictment, IR. 2) as "illicit distillery" (IR. 43) resulted in no prejudice to petitioner and is of no import whatever. *See Breese v. United States*, 226 U.S. 1, 11.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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FEBRUARY 1962.

APPENDIX

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 8275

LEROY ALPHONSO HAITH, APPELLANT

v.

UNITED STATES OF AMERICA, APPELLEE

Appeal from the United States District Court for the Eastern District of Virginia, at Richmond

BRIEF OF APPELLANT

* * * * *

STATEMENT OF FACTS

The appellant waived a Jury herein and the case was tried by the Honorable Oren R. Lewis, District Judge, who found the appellant "guilty" on both counts of the indictment.

A stipulation of facts was allowed by Judge Lewis, in lieu of the witnesses testifying. Such stipulation meets the requirement of law. *Diaz v. United States*, 32 S. Ct. 250.

It was stipulated that Government Agents followed a 1960 Pontiac automobile operated by the appellant in Richmond, Virginia, following him to his home; and that said agents while in his said house served upon the appellant a lawful warrant, thereby placing the appellant under arrest. That when appellant ar-

rived at his said home, he parked his 1960 Pontiac automobile twenty-five feet from the front door of his house.

Thereupon the said Federal Agents asked the appellant for the keys of his automobile and that appellant came from his house into the street where the said automobile was parked and gave the agents keys that fit the ignition, but did not fit the trunk of the car.

Then appellant was asked for the keys to the trunk, and he stated that he did not have them.

One of the Agents then proceeded to search the said automobile, taking out the back seat and punching a hole in the cardboard.

Then he reached into trunk section of the automobile and took out a half-gallon jar containing corn liquor. The appellant then gave the agent the key to the trunk of said automobile.

The trunk of the automobile was then opened by the agent in the presence of the appellant. And about 90 gallons of corn liquor was found therein.

It was further stipulated by the appellant that said corn liquor did not have the necessary government revenue stamps thereon and that the Government agents had probable cause for the search of the automobile at the time of said search.

The motion of counsel to suppress the evidence obtained as aforesaid was overruled and the appellant found guilty on both counts of the indictment; and later sentenced to a term of two (2) years' imprisonment. See opinion of trial Judge and stipulation contained therein (App. pp. 2–9).